

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVON B. DAVIS,

Defendant-Appellant.

UNPUBLISHED

March 26, 2002

No. 226313

Wayne Circuit Court

LC No. 99-008454

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm, MCL 750.84, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twelve to twenty-five years' imprisonment for the carjacking conviction, twenty-three months to ten years for the assault with the intent to do great bodily harm conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that reversal is warranted on the basis of the trial court's failure to grant a mistrial following questioning by defense counsel during the cross-examination of a police officer. We disagree. This Court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). An unresponsive, volunteered answer by a witness to a proper question, that injects improper evidence into a trial, generally is not grounds for a mistrial unless the prosecutor knew in advance that the witness would offer the unresponsive testimony or the prosecutor conspired with or encouraged the witness to offer that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). In order to require reversal, the error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Our review of the record indicates that defense counsel elicited the police officer's statement by engaging in an aggressive line of questioning on cross-examination that would likely lead to a violation of the trial court's order. *People v Gonzales*, 193 Mich App 263, 266;

483 NW2d 458 (1992). Defense counsel cross-examined the police officer in the following manner:

Q. [The photograph of defendant] happened to be just located right next to your desk?

A. Negative. No, it was not next to my desk.

Q. On top of your desk?

A. No, not on top of my desk.

Q. Underneath your desk?

A. Not underneath my desk.

Q. On the ceiling?

* * *

Q. Where was it?

A. . . . Behind my desk is a “Wanted” poster board. That’s where we keep all the wanted persons on that board.

“Permitting reversal might improperly encourage overly aggressive, combative, cross-examination tactics, in the hope of soliciting an untoward outburst to harbor as appellate error in the event of an adverse trial result.” *Id.* at 266. We conclude that the trial court properly denied defendant’s motion for a mistrial. *Id.*

Defendant next argues that the prosecutor engaged in misconduct by suggesting that defense counsel was intentionally misleading the jury. We disagree. This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Here, the prosecutor’s comments were not improper because he was rebutting charges made in defense counsel’s cross-examination of the complainant. Specifically, the prosecutor was rebutting defense counsel’s argument that the victim of the carjacking never informed the police that defendant and the person he identified on the “wanted” poster board were one and the same person. Defense counsel focused exclusively on the beginning portion of the complainant’s police statement without referencing later portions when he identified the person’s photograph as defendant’s. Improper prosecutorial remarks generally do not require reversal if

they are responsive to issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977) (Ryan, J.); *Watson*, *supra* at 592-593.

Defendant next argues that the trial court improperly submitted the assault with intent to commit murder charge to the jury. We disagree. When reviewing a trial court's decision for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

"To give a particular instruction to a jury, it is necessary that there be evidence to support the giving of that instruction." *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). Thus, to warrant an instruction on assault with the intent to commit murder, the prosecution had to submit evidence to support a finding of (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would have made the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Here, defendant takes issue only with the intent element. The question of defendant's intent is one of fact which may be inferred from the circumstances by the trier of fact. *People v Tower*, 215 Mich App 318, 323; 544 NW2d 752 (1996). The intent to kill may be proved by inference from any facts in evidence. *McRunels*, *supra* at 181. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime. *Id.* Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Id.*

Considering the evidence in a light most favorable to the prosecution, in light of the circumstances of the instant offense, and the location and nature of the complainant's wounds, we are satisfied that the essential elements were proven beyond a reasonable doubt, leaving it to the jury to decide if defendant had the requisite intent to kill. Thus, the trial court properly submitted the charge to the jury. *Aldrich*, *supra* at 122.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot